# ICC ELIMINATION/Jurisdiction & Standards for Railroad Mergers

**SUBJECT:** **Interstate Commerce Commission Sunset Act . . . S. 1396. Pressler motion to table the Dorgan/Bond amendment No. 3064.**

## ACTION: MOTION TO TABLE AGREED TO, 62-35

**SYNOPSIS:** As reported, S. 1396, the Interstate Commerce Commission Sunset Act, will eliminate the Interstate Commerce Commission (ICC) and the Federal Maritime Commission (FMC).

**The Dorgan/Bond amendment** would require Justice Department approval for all proposed railroad mergers. The Justice Department would evaluate mergers using the "Clayton 7" test from the Clayton Act of 1914. Under that test, the Government would bring suit to stop a merger of companies if it found that the merger would substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country.

Debate was limited by unanimous consent. Following debate, Senator Pressler moved to table the amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

**Those favoring** the motion to table contended:

In the last 15 years, there have been roughly a dozen rail mergers in the United States. Some Senators are concerned that the fact these mergers took place indicates that the Interstate Commerce Commission (ICC), which approved them, was insufficiently concerned about preventing the formation of monopolies. They accordingly have proposed this amendment, to apply the 1914 Clayton Act standard to railroad mergers. In our estimation, our colleagues' concerns are without merit, and their proposed solution would harm the industry.

In 1914 Congress passed the Clayton Act. That Act included a standard for assessing whether a proposed merger would be anti-competitive. In 1920, it passed an exemption for the railway industry when it recognized that applying a pure antitrust standard to rail mergers was inappropriate. For the past 75 years, that exemption has applied. Instead of judging mergers entirely on whether

(See other side)

**YEAS (62)**

| Republicans (48 or 92%) | | Democrats (14 or 31%) |
|---|---|---|
| Abraham | Inhofe | Bingaman |
| Ashcroft | Jeffords | Bryan |
| Bennett | Kassebaum | Exon |
| Brown | Kempthorne | Feinstein |
| Burns | Kyl | Ford |
| Campbell | Lott | Hollings |
| Chafee | Lugar | Inouye |
| Coats | Mack | Kerrey |
| Coverdell | McCain | Kohl |
| Craig | McConnell | Moseley-Braun |
| D'Amato | Murkowski | Nunn |
| Dole | Nickles | Reid |
| Domenici | Pressler | Robb |
| Faircloth | Roth | Rockefeller |
| Frist | Santorum | |
| Gorton | Shelby | |
| Gramm | Simpson | |
| Grams | Smith | |
| Grassley | Snowe | |
| Gregg | Specter | |
| Hatch | Stevens | |
| Hatfield | Thomas | |
| Helms | Thompson | |
| Hutchison | Thurmond | |

**NAYS (35)**

| Republicans (4 or 8%) | Democrats (31 or 69%) | |
|---|---|---|
| Bond | Akaka | Heflin |
| Cochran | Baucus | Johnston |
| Cohen | Boxer | Kennedy |
| DeWine | Bradley | Kerry |
| | Breaux | Lautenberg |
| | Bumpers | Leahy |
| | Byrd | Levin |
| | Conrad | Lieberman |
| | Daschle | Mikulski |
| | Dodd | Moynihan |
| | Dorgan | Murray |
| | Feingold | Pell |
| | Glenn | Pryor |
| | Graham | Sarbanes |
| | Harkin | Simon |
| | | Wellstone |

**NOT VOTING (2)**

| Republicans (1) | Democrats (1) |
|---|---|
| Warner-[2] | Biden-[2] |

**EXPLANATION OF ABSENCE:**
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

**SYMBOLS:**
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

or not they would substantially lessen competition or create a monopoly in any line of commerce in any section of the country (the Clayton test), the Interstate Commerce Commission (ICC) has judged them using a broader "public interest" standard. The ICC weighs all effects of mergers, not just competitive effects. For instance, in the 1988 UP/MKT merger, a number of markets went from three railroads to two. The Justice Department and others argued that this merger should not be allowed for this reason. The ICC rejected that argument, finding that the continued competition from a strong second railroad, the increase in competition from the merged system's introductions of new routes and other service improvements, and other competitive constraints such as modal and source competition together outweighed the negative effects of dropping to two railroads in many markets. Time has proven that the ICC was right; competition has intensified, services have improved, and prices have dropped. This example is not an isolated case. In the past 15 years there have been a dozen larger mergers, and during the same timeframe overall industry rates have fallen by up to 50 percent, with the decreases occurring every year across all major commodity groups and in all major geographic areas.

Under the current ICC process (which will be retained by the Board in the Transportation Department that will succeed the ICC), mergers are considered under an open review process that allows all interested parties to present their arguments. If the ICC permits a merger, it may attach conditions, and its approval preempts other laws that may stand in the merger's way. In contrast, application of the Clayton test by the Justice Department would involve closed, ex parte proceedings. The Department would not speak with all interested parties. When it made a decision, it would be whether or not to sue to stop a proposed merger. It would not have any authority to attach conditions to a merger--it would be an all-or-nothing proposition. Further, even if it lost, railroad companies that wished to merge would still be bound by the requirements of other laws, which would be difficult to meet without an ICC waiver.

In summary, the ICC has done an admirable job of regulating the railroads to serve the public interest. Giving the Justice Department a veto authority over this process using a much narrower Clayton Act test would create an adversarial process that would make it virtually impossible for railroads to ever again merge. We oppose that result, and thus oppose this amendment.

**Those opposing** the motion to table contended:

The railway industry has seen several recent large mergers. This bill will do nothing to stem that trend. Our fear is that these mergers are leading to a monopolistic situation that will harm railway customers. This amendment would guard against this event by giving the Department of Justice the authority to review proposed mergers and to put stays on any mergers that it thought would violate the Clayton Act's antitrust standard.

We do not believe that the market runs best when it is run by the Government. No matter how clever Federal employees may be, they are not going to run matters as efficiently or effectively as millions of Americans choosing among products and services offered by competing companies. However, we also do not believe in monopolies or oligopolies. Every business naturally wants to have a corner on its market; no business wants competition to force down its own prices. Businesses will naturally try to gain monopoly or oligopoly power. In most cases, the market itself will prevent them from succeeding. In other cases, Government regulation is necessary to hold them in check.

The railway industry is a case in point. Senators know, as a practical matter, that no new rail lines are going to be built anytime soon. Perhaps a few short lines may be added, but no one is about to build a line from Los Angeles to Chicago, for example. For many businesses, shipping by rail is much more economical than shipping by barge, truck, or aircraft, at least where they have a choice of railway companies. In areas where there is only one railroad company, businesses and farmers are more likely to be charged the same amount as the next cheapest shipping choice. We understand that advantages of efficiency can come for railroad companies if they combine together, but if the result is that they gain monopoly control over the prices they charge their customers then we can do without that efficiency. Our goal is to have competition so that customers get lower prices. If railway companies can combine to achieve efficiencies without hurting competition then we are all for it, because they will in turn lower their prices and thus help all those businesses that ship their goods by rail.

Under current law, and as it will be maintained in this bill, the overall goal in assessing railway mergers is not to prevent monopolistic practices. Instead, the prevention of monopoly formation is just one goal in a mix of goals that are considered when determining if a proposed merger is in the "public interest" and should thus be allowed. This current law has not prevented the ICC from approving mergers. We do not expect that the new board in the Transportation Department that will be created by this Act will rule on these matters any differently. Accordingly, we have proposed in this amendment that the Department of Justice review every proposed merger for Clayton Act violations and to put a stay on any agreed upon merger if it finds that it violates the Clayton Act. A merger would violate that Act if it would substantially lessen competition or would tend to create a monopoly in any line of commerce in any section of the country.

This issue is especially vital for rural areas. As we move to greater economies of scale, fewer companies will operate in more remote areas. We have seen this pattern with the deregulation of other industries, particularly the airline industry. We are likely soon to see just a few large railroad companies operating nationwide in high-volume markets at low rates and subsidizing those low rates by charging less important markets more. We oppose that end. We wish to preserve the competitive nature of this industry. Therefore, we strongly support the Dorgan amendment.